STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH RATHBURN, Individually and as Next Friend of JUSTIN WADE CHILDREY, a Minor,

Plaintiff-Appellant,

v

CHILDREN'S HOSPITAL OF MICHIGAN, PATRICIA SIEGEL, PH.D., DR. PILTCH, M.D., STEVE COHEN, PH.D., SANFORD COHEN, M.D., JOSEPH KAPLAN, M.D., DR. ABDEL-HAQ, M.D., and DR. ELIZABETH SECORD, M.D.,

Defendants-Appellees.

UNPUBLISHED
March 1, 2005

No. 250126
Wayne Circuit Court
LC No. 02-235017-NO

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff, individually and as next friend of her minor son, Justin Wade Childrey, appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

This case arises from defendants' involvement in reporting suspected child abuse by plaintiff against Justin to the Family Independence Agency (FIA). Plaintiff named as defendants Children's Hospital of Michigan (CHM), where Justin was treated and hospitalized, and several individual defendants, each of whom are medical doctors or licensed psychologists.

Plaintiff's complaint alleges that Justin was admitted to CHM in May 2000, for complaints involving a fever, headache, and facial pain, and that he was still hospitalized in June 2000, when defendants, through defendant Patricia Seigel, reported plaintiff's suspected abuse or neglect of Justin using standard Form 3200. Justin allegedly was placed in foster care and was subject to two essentially identical child protection petitions in the Wayne Circuit Court Family Division. The first petition was allegedly dismissed by a judge after a referee found probable cause for the petition. The second petition was allegedly dismissed at the adjudicative trial, based on the court's determination that the petitioner failed to prove a statutory basis for jurisdiction by a preponderance of the evidence.

Plaintiff's complaint alleges two counts: (1) a violation of reporting requirements under the Child Protection Law, MCL 722.621 *et seq.*; and (2) malicious prosecution against plaintiff. Defendants moved for summary disposition under MCR 2.116(C)(7) and (8). The trial court, after finding that plaintiff's complaint sounded in medical malpractice, granted defendants' motion, concluding that plaintiff's action was barred by the applicable statute of limitations.

We review de novo a trial court's decision regarding a motion for summary disposition. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court's analysis is brief, we affirm the result because, apart from alleging a claim for medical malpractice arising from the individual defendants' professional relationship with Justin, plaintiff's complaint fails to state a claim upon which relief may be granted. MCR 2.116(C)(8); *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18; 684 NW2d 391 (2004).

The gravamen of an action is determined by reading the claim as a whole. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), modified by *Patterson v Kleiman*, 447 Mich 429, 433-435 (1994). Issues of statutory construction are reviewed de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

Courts have generally considered whether a claim sounds in medical malpractice when evaluating a plaintiff's contention that an alleged claim is one for ordinary negligence. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999); *Simmons, supra* at 253-254. In this context, it has been said that the key to a medical malpractice claim is whether the alleged conduct occurred within the course of a professional relationship. *Dorris, supra* at 45. Moreover, "[t]he determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Id.* at 46; see also *Bryant, supra* at 422.

The allegations in plaintiff's complaint raise questions of medical judgment during the course of defendants' professional relationship with Justin. Plaintiff alleges that defendants failed to investigate Justin's prior medical history adequately before suspecting that plaintiff abused or neglected him. Thus, the trial court did not err in concluding that the complaint sounded in medical malpractice on behalf of Justin and that dismissal was appropriate.[1]

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[1] Because plaintiff does not challenge the trial court's determination that an action for medical malpractice is barred by the statute of limitations, any question in this regard is deemed abandoned. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Plaintiff notes that the complaint does not allege that *plaintiff* had a professional relationship with defendants and that the trial court therefore erred in characterizing the complaint as sounding in malpractice. However, this omission affords no basis for relief because, even in an ordinary negligence action, a party must establish a relationship giving rise to a duty. *Marcelletti v Bathani*, 198 Mich App 655, 663; 500 NW2d 124 (1993). Under the common law, "actionable negligence presupposes a legal relationship between the parties by which the injured party is owed a duty by the other" party. *Fultz v Union-Commerce Associates*, 470 Mich 460, 465; 683 NW2d 587 (2004) (internal citation and quotation omitted). The duty may arise specifically by statutory mandate, contract, or operation of the common law. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Because plaintiff's complaint does not allege a legal relationship between herself and any defendant that gives rise to a reporting duty owed to her personally, we hold that plaintiff's individual claim likewise fails, whether under ordinary negligence or malpractice principles.

The next question to be resolved is whether plaintiff's complaint states statutory and malicious prosecution claims independent of ordinary negligence principles or the alleged medical malpractice.

We hold that plaintiff's complaint fails to state a legally cognizable statutory cause of action under the Child Protection Law with respect to either plaintiff's individual claim or Justin's claim against defendants. Plaintiff's reliance on MCL 722.623 is misplaced because that statute only provides a private cause of action for an identified child for damages proximately caused by the failure to report abuse. MCL 722.633(1); *Marcelletti*, *supra* at 659-660. Further, MCL 722.625 does not create a cause of action, but rather is an immunity statute. Cf. *Beaudrie v Henderson*, 465 Mich 124, 139 n 12; 631 NW2d 308 (2001), (MCL 691.1407, the statute prescribing immunity for governmental employees, does not create a cause of action). When the language of a statute is clear, we must enforce it as written. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003), amended 468 Mich 1216 (2003). Hence, plaintiff's complaint does not allege a legally cognizable statutory claim based on defendants' report of suspected child abuse.

Plaintiff gives only cursory treatment to her claim that count two of her complaint sufficiently alleges a cause of action for malicious prosecution in her individual capacity. In any event, the claim is based on the initiation of child protection proceedings, and an adjudication in a child protection proceeding is tied to the child, not the parent. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2001). The purpose of an adjudication is to determine whether the court may exercise jurisdiction over the child. *In re Brock*, 442 Mich 101, 107; 499 NW2d 752 (1993); *In re CR*, *supra* at 200. Because the subject of a child protection proceeding is the child, we conclude that plaintiff's complaint does not allege a cognizable claim for malicious civil prosecution against her. Accepting all of plaintiff's allegations in her complaint as true, no factual development could justify plaintiff's claim for relief. *Spiek*, *supra* at 337-339.

Furthermore, even assuming that plaintiff could proceed on the basis that the child protection action was initiated against her, the second count of her complaint is legally insufficient to state a claim. A child protection proceeding is not a criminal proceeding. *In re Brock*, *supra* at 107. Hence, the only possible basis for the claim is malicious civil prosecution, the elements of which are: (1) the defendants initiated a prior legal action against the plaintiff, (2) the prior proceedings terminated in the plaintiff's favor, (3) there was an absence of probable

cause for the proceeding, (4) the defendants acted with malice, i.e., a purpose other than securing the proper adjudication of the claim, and (5) special injury resulted. *Friedman v Dozorc*, 412 Mich 1, 48; 312 NW2d 585 (1981); *Hall v Citizens Ins Co*, 141 Mich App 676, 683; 368 NW2d 250 (1985).

Although, as noted, this case does not involve a criminal proceeding, certain principles applicable to malicious criminal prosecutions may be applied, by analogy, to the extent this case involves circumstances similar to a proceeding in which a prosecutor acts on information provided by a private person to initiate a criminal action. Cf. *In re CR, supra* at 197-198 (ineffective assistance of counsel principles in the criminal context may be applied by analogy to child protection proceedings). In the criminal context, a prosecutor's exercise of independent discretion in initiating and maintaining a prosecution is generally a complete defense to a malicious prosecution action. *Matthews v Blue Cross & Blue Cross of Michigan*, 456 Mich 365, 379; 572 NW2d 603 (1998). An exception exists if the provider of information knowingly gives false information and the prosecutor acted on that information. *Id.* at 385.

The circumstances of this case are similar to a criminal proceeding as discussed in *Matthews*, inasmuch as plaintiff's complaint does not allege that defendants were the petitioner in the child protection proceeding. Rather, plaintiff alleges that defendants initiated a child protection proceeding by filing a Form 3200. Under the Child Protection Law, this action triggers a duty on the part of the FIA to conduct an investigation to determine if the child was abused or neglected and to perform other duties to safeguard the child's welfare. MCL 722.628. Hence, like in a malicious criminal prosecution action, it was necessary that plaintiff establish that defendants knowingly gave false information to the petitioner.

Examined in this context, the factual allegations in plaintiff's complaint are insufficient to state a claim. The complaint does not allege that defendants knowingly provided false information. Further, the complaint contains only conclusive averments regarding the absence of probable cause. "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Even in the absence of the trial court's determination that plaintiff's complaint sounded in medical malpractice, summary disposition under MCR 2.116(C)(8) would have been proper with regard to both counts. Accordingly, we affirm the trial court's grant of summary disposition in favor of defendants. Plaintiff failed to plead a cause of action for which she, individually, or as next friend of Justin, could recover against defendants.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens